October 16, 2018

Submitted via http://apps.fcc.gov/ecfs/

Commission's Secretary
Office of the Secretary
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

RE: CG Docket Nos. 18-152, 02-278

Dear Chairman and Commissioners:

Encore Capital Group, Inc. (along with its subsidiaries, collectively referred to as "Encore") submits its comments in the above-referenced dockets. To date, Encore has purposely abstained from directly commenting on the definition of an automatic telephone dialing system ("ATDS"), but we feel compelled to comment at this pivotal juncture given the importance of this issue to the one out of five American consumers our company works with.

We are the largest global purchaser of delinquent consumer credit obligations. Thus, of course, being able to communicate without our consumers is vitally important to us. Just as importantly, our consumers also receive an immense benefit from being able to partner with us to discuss their debt repayment and path to financial recovery. The benefits to consumers of telephone communication include being able to pay back their debt obligations, improve their credit, and avoid litigation. Unfortunately, with the extreme uncertainty over what constitutes an ATDS, our consumers have been hampered from speaking with us by phone. The results for our consumers have been less debt resolved, poorer credit outcomes, and more communication with

us via litigation instead of by telephone.[1] These are not good outcomes, but are the direct result of the 2015 Order and out-of-control TCPA litigation over the past decade. We hope that the FCC seizes this crucial moment to make good public policy that brings certainty to the TCPA and the parties that operate under its requirements.

The D.C. Circuit Vacated the FCC's Expansive Interpretation of an ATDS – and the Ninth Circuit Improperly Re-expanded that Interpretation

In *Marks*, the Ninth Circuit held that, "because the D.C. Circuit vacated the FCC's interpretation of what sort of device qualified as an ATDS, only the statutory definition of ATDS as set forth by Congress in 1991 remains . . . Accordingly we must begin anew to consider the definition of ATDS under the TCPA."[2] What the Ninth Circuit went on to do was, with all due respect, contradict the D.C. Circuit's ruling in *ACA v. FCC*[3] and interpret the definition of ATDS incorrectly and illogically.

Marks went expressly beyond what the D.C. Circuit so clearly said was an overbroad interpretation of ATDS, and adopted an unreasonably expansive definition strikingly similar in outcome to the FCC's 2015 Order. The Ninth Circuit literally re-wrote the statute so as to separate from the same clause the requirements "to store numbers to be called" and "using a random or sequential number generator."[4] By so re-writing the statute, *Marks* stated that any device that has capacity to store and dial random or sequential numbers – now or in the future –

[1] Filing a collection lawsuit is almost always a last resort for creditors and debt purchasers, as it is an expensive collection option and a poor outcome for our consumers. However, if a creditor or debt purchaser is unable to reach a consumer by phone, litigation is typically the only way to preserve the legal right to collect. Over the past decade, in part because it has become more challenging to contact consumers by phone, collection litigation has increased significantly for Encore and many other large creditors and debt purchasers.
[2] *Marks v. Crunch San Diego, LLC*, No. 14-56834 (9th Cir. Sep. 20, 2018).
[3] *ACA International v. FCC*, No. 15-1211 (D.C. Cir. Mar. 16, 2018).
[4] *Marks* at 23.

is an ATDS. The *ACA* court, however, held that the TCPA unambiguously foreclosed any interpretation that "would appear to subject ordinary calls from any conventional smartphone to the Act's coverage."[5] What the *Marks* court ruled, however, would do just that: subject to the Act's coverage any conventional smartphone that can store and then dial numbers. This means that, for the 77% of Americans who own smartphones,[6] each is "a TCPA-violator-in-waiting, if not a violator-in-fact."[7]

Unfortunately, the Ninth Circuit's own interpretation of ATDS is no less convoluted than that in the 2015 Order. By holding that the TCPA's language is ambiguous and reading that any device with the capacity to dial stored numbers is an ATDS, the *Marks* court contradicted its prior ruling in *Satterfield* that the definition of ATDS is "clear and unambiguous."[8] The *Marks* court's reading drastically alters the meaning from what *Satterfield* confirmed was Congress's "clear and unambiguous" intent.[9]

Indeed, we do not believe that the text of the statute is ambiguous. It clearly says that in order to be an ATDS, a device must have a random or sequential number generator. This interpretation makes sense for numerous reasons, including the construction of the statutory text, and the technological environment that existed when the statute was initially passed. In other words, the TCPA was enacted to prevent telemarketing companies from making random calls to random people. That is the function of a random or sequential number generator.

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[5] *ACA* at 5.
[6] Pew Research Center, "Mobile Fact Sheet," Feb. 5, 2018, located at: http://www.pewinternet.org/fact-sheet/mobile/.
[7] *ACA* at 17.
[8] *Satterfield v. Simon & Schuster, Inc*., 569 F.3d 946, 951 (9th Cir. 2009).
[9] 569 F.3d at 950.

Even if one maintains that the text is ambiguous, that ambiguity only arises from the fact that the statute was passed at a time when much of the technology that exists today did not exist or was in its early infancy. Indeed, the harm that Congress was attempting to prevent when it passed the TCPA (random, annoying calls) does not exist in an environment where legitimate businesses are using predictive dialers to contact their consumers.

Although *Marks* directly contradicted *Satterfield* and the *ACA* court's ruling, another recent case in the Third Circuit, *Dominguez v. Yahoo,*[10] carefully followed *ACA* and got the right result. In *Dominguez*, the court stated that, "in light of the D.C. Circuit's holding, we interpret the statutory definition of an autodialer as we did prior to the issuance of 2015 Declaratory Ruling."[11] *Dominguez* stated that the "key" question post-ACA is whether the equipment "had the present capacity to function as an autodialer by generating random or sequential numbers and dialing those numbers,"[12] and granted summary judgment in favor of Yahoo as there was no evidence that Yaloo's Email SMS Service had the present capacity to function as an autodialer by generating random or sequential telephone numbers and dialing those numbers.[13]

Marks took a completely different approach and, unlike *Dominguez,* chose to disregard the *ACA*'s ruling that the 2015 Order was "unreasonably expansive".[14] *Marks* held that "the statutory definition of ATDS includes a device that stores telephone numbers to be called, whether or not those numbers have been generated by a random or sequential number generator."

[10] *Dominguez v. Yahoo, Inc.*, 894 F.3d 116 (3rd Cir. 2018).
[11] *Id.* at 119.
[12] *Id.* at 121.
[13] *Id.*
[14] *ACA* at 5 ("The Commission's understanding would appear to subject ordinary calls from any smartphone to the Act's coverage, an unreasonably expansive interpretation of the statute."

This interpretation is as broad as that of the 2015 Order, and could reasonably include a smartphone – exactly what *ACA* held was unreasonably expansive.[15]

In short, *Marks* contradicted its own Circuit's ruling in *Satterfield*, and is an outlier from the D.C. Circuit and Third Circuit rulings. Rather than follow *ACA*, *Marks* took the liberty of creating its own novel reading (if not blatant re-writing) of the statute and came up with the same result that the *ACA* ruling vacated. *ACA* held that the FCC's 2015 ruling was "unreasonably, and impermissibly, expansive,"[16] but *Marks* incorrectly took an unreasonably expansive approach at odds with *ACA*, *Dominguez*, and *Satterfield*.

In addition to the D.C. Circuit's vacating the 2015 Order as unreasonably expansive, Chairman Pai and Commissioner O'Reilly both vehemently disagreed with the 2015 Order's overly expansive definition. In his dissent to the 2015 Order, Chairman Pai charitably called it "a bit of a mess."[17] Affected parties – included a wide array of industries that seek to make legitimate phone calls to customers – were left in a "significant fog" of uncertainty about how to determine if device is an ATDS.[18] As the D.C. Circuit instructed in *ACA*, it is incumbent on the FCC to reexamine the definition of ATDS, and provide the clarity so desperately needed.[19]

[15] *ACA* at 17 ("The TCPA cannot reasonably be read to render every smartphone an ATDS subject to the Act's restrictions, such that every smartphone user violates federal law whenever she makes a call or sends a text message without advance consent."
[16] *ACA* at 23.
[17] Dissenting Statement of Commissioner Ajit Pai, *In the Matter of Rules and regulations Implementing the Telephone Consumer Protection Act of 1991*, CG Docket No. 02-278, WC Docket No. 07-136, at 4 (hereinafter "Pai Dissent").
[18] *ACA* at 29.
[19] *Id.*

Both Smartphones and Predictive Dialers are Modern Technologies Not in the TCPA's Bailiwick – And the Courts and FCC Cannot Expand the TCPA's Reach to Newer Technologies Without Express Authorization from Congress

In 1991, cell phones were rare among the general public and cost a small fortune. Back then, the first types of predictive dialers were in their infancy. Needless to say, there was no texting, Twitter, Instagram, smartphones or apps. Neither predictive dialers, smartphones, Twitter nor any of the numerous modern technologies listed above were contemplated by Congress when the TCPA was enacted. As technologies have proliferated over the past almost three decades, courts and the FCC itself have twisted and turned the statute to apply to newer technologies beyond what Congress ever imaged in 1991.

In his 2015 dissent, Chairman Pai stated that "if the FCC wants to take action against newer technologies beyond the TCPA's bailiwick, it must get express authorization from Congress -- not make up the law as it goes along."[20] Likewise, *ACA* rejected the 2015 Order's suggestion that "unless 'capacity' reached so broadly, little or no modern dialing equipment would fit the statutory definition."[21] *ACA* stated that, to the contrary, "Congress need not be presumed to have intended the term 'automatic telephone dialing system' to maintain its applicability to modern phone equipment in perpetuity, regardless of technological advances that may render the term increasingly inapplicable over time."[22]

With this in mind, we urge the Commission to focus not just on smartphones, but also other modern technologies that were not contemplated when the TCPA was enacted. That a smartphone should not be categorized as an ATDS is apparent, given that smartphones are so

[20] Pai Dissent at 3.
[21] 2015 Declaratory Ruling, 30 FCC Rcd. At 7976 ¶ 20 (cited by *ACA* at 20).
[22] *ACA* at 20.

pervasive and it would be truly ridiculous to categorize a smartphone as an ATDS and have every potential smartphone user as a potential TCPA violator. In *ACA*, the D.C. Circuit held that "[i]t is untenable to construe the term "capacity" in the statutory definition of an ATDS in a manner that brings within the definition's fold the most ubiquitous type of phone equipment known, used countless times each day for routine communications by the vast majority of people in the country. It cannot be the case that every uninvited communication from a smartphone infringes federal law, and that nearly every American is a TCPA-violator-in-waiting, if not a violator-in-fact."[23] As such, the D.C. Circuit ruled that "the Commission's [2015] ruling, in describing the functions a device must perform to qualify as an autodialer, fails to satisfy the requirement of reasoned decisionmaking. The order's lack of clarity about which functions qualify a device as an autodialer compounds the unreasonableness of the Commission's expansive understanding of when a device has the "capacity" to perform the necessary functions."[24]

Unlike smartphones, however, predictive dialers are less well-understood, and how a predictive dialer differs from an auto-dialer is less obvious on its face. Like a smartphone, however, there is no more than a theoretical potential for a predictive dialer to be modified to become an ATDS.

Like an auto-dialer, a predictive dialer is a tool to make phone calls to large volumes of numbers. But that is where the similarities end. Predictive dialers are used by companies to dial their consumers' phone numbers to provide them with information. Predictive dialers are used to

[23] *ACA* at 17.
[24] *See id*. at 14-20.

ensure that, in a highly regulated industry such as debt collector, our calls are made within the times allowed under the Fair Debt Collection Practices Act (FDCPA).[25]

Companies like us use predictive dialers to contact our consumers, and we would like to explain what predictive dialers *don't* do:

- ***Predictive dialers don't store or generate random or sequential numbers***. Doing so would be a violation of federal law, as the FDCPA prohibits debt collectors from calling anyone about a debt that is not their debt.[26] Dialing random people is truly the opposite of what debt collectors seek to do; the goal is to contact the right consumers, who owes a debt obligation and wants to discuss paying it back. Beyond acting in compliance with the law, our desire to make contact with the right consumers makes business sense; random people will not pay a debt obligation owed by someone else.[27]
- ***Predictive dialers don't call all day long and harass consumers***. One of the key drivers for the 1991 TCPA statute was to clamp down on the scourge of auto-dialed calls harassing people at home during dinner time.[28] However, it is a

[25] 15 U.S.C. § 1692c(a)(1) (prohibits debt collector from communication with consumer "at any unusual time or place or a time or place known or which should be known to be inconvenient to the consumer. In the absence of knowledge of circumstances to the contrary, a debt collector shall assume that the convenient time for communicating with a consumer is after 8 o'clock antemeridian and before 9 o'clock postmeridian, local time at the consumer's location").
[26] 15 U.S.C. § 1692c(b) (prohibits communication with third parties "without the prior consent of the consumer given directly to the debt collector").
[27] Congress also noted that the FCC "should have the flexibility to design different rules for those types of automated or prerecorded calls that it finds are not considered a nuisance or invasion of privacy." 47 U.S.C. § 227 note, Pub. L. No. 102-243, §2(13), 105 Stat. 2394, 2395 (cited by *ACA* at 7). In the case of time-sensitive, informational calls to consumers about their credit card accounts, how to repay their accounts and repair their credit, it can hardly be argued that those are a "nuisance or invasion of privacy."
[28] Report of the Energy and Commerce Committee of the U.S. House of Representatives, H.R. Rep. 102-317, at 8-9 (1991) ("House Report") (citing to the annoyance of residential telephone customers in receiving frequent sales, solicitation and advertising calls).

violation of federal law for debt collectors to repeatedly call consumers, as the FDCPA prohibits debt collectors from harassing consumers through repeated phone calls.[29]

The FCC stated that more than a "theoretical potential" is needed that equipment could be modified to become an ATDS.[30] For predictive dialers, which do not have the present capacity to store, generate or dial random or sequential numbers, there is no more than a "theoretical potential" that the predictive dialer could be modified to do that. In this regard, there is no difference between the more than "theoretical potential" for a smartphone or predictive dialer to be modified to become an ATDS. The analysis is the same for both smartphones and predictive dialers.

With the above in mind, it is important to note that virtually every device that calls telephone numbers in today's world stores them for at least a short time. Gone are the days of touchtone telephones that were dependent on human brains to store numbers. Now, the devices themselves store the numbers, even if for a millisecond, prior to launching calls. So not only do they have the "potential capacity," they have the "actual capacity" to store numbers. Under *Marks*, all smartphones and predictive dialers could be an ATDS. This, however, is an untenable result, as the *ACA* court made clear: "[i]t cannot be the case that every uninvited communication

[29] 15 U.S.C. § 1692d(5) (prohibits a debt collector from "causing a telephone to ring or engaging any person in telephone conversation repeatedly or continuously with intent to annoy, abuse, or harass any person at the called number"); see *ACA* at 7 ("As Congress explained, the FCC 'should have the flexibility to design different rules for those types of automated or prerecorded calls that it finds are not considered a nuisance or invasion of privacy.'"). These are legitimate calls on a legitimate account- neither a nuisance nor invasion of privacy, so long as in compliance with federal law governing debt collection calls (FDCPA).

[30] *ACA* at 22.

from a smartphone infringes federal law, and that nearly every American is a TCPA-violator-in-waiting, if not a violator-in-fact."[31]

Rampant TCPA Litigation Has Fueled an Untenable Business Environment

As the Chairman stated in his 2015 dissent, the "TCPA is a poster child for lawsuit abuse."[32] Trial lawyers have generated an extremely profitable livelihood out of suing legitimate, domestic businesses that communicate with their consumers. Those business, including Encore, do not generate or dial random or sequential numbers. Instead, they call the numbers of the customers they wish to reach for often time-sensitive, informational communications about their accounts. Indeed, Congress did not intend for the statute to "be a barrier to the normal expected or desired communications between businesses and their customers."[33] Unfortunately for legitimate companies and their consumers, the FCC's orders over the years creating extreme expansions of the 1991 law to apply to predictive dialers without the ability to generate, store or dial random or sequential numbers, and later to smartphones, have spawned a startling result: a ***27,000% increase in TCPA litigation*** over the past decade, from 16 cases filed in 2008 to 4,392 cases filed in 2018. With a new TCPA lawsuit just around the corner, businesses that have a large number of consumers and use a dialing device to reach them are living in constant fear of being sued.

Tellingly, the Ninth Circuit made no note of this concern. In fact, the *Marks* plaintiff, and his attorneys, are a perfect illustration of how bad things have gotten. *Marks* concerned three text messages sent over an eleven-month period. What is more, the plaintiff was a consumer of

[31] *ACA* at 17.
[32] Pai Dissent at 2.
[33] House Report at 17.

the defendant fitness center and had given defendant his cellular number. Beyond those unbelievable facts, the San Diego-based law firm that represented plaintiff has made its fortune over the past decade seeking out potential TCPA plaintiffs and filing lawsuits against any corporate defendants it could find, including Encore and hundreds of other corporate defendants across the nation. As Chairman Pai stated in his 2015 dissent, the "primary beneficiaries [of the 2015 Order] were trial lawyers, not the public."[34] Unfortunately, the Ninth Circuit chose to ignore this absurdity and instead adopted essentially the same definition of an ATDS that the D.C. Circuit vacated as "unreasonably, and impermissibly, expansive."[35]

Under *Marks*, plaintiffs' attorneys will continue to make their money suing for TCPA violations, and will use *Marks* to interpret the definition of ATDS as broadly and unreasonably as possible. Should *Marks's* interpretation stand in any way, we expect to see the courts increasingly clogged with TCPA litigation.

The TCPA has strayed far from its original purpose. The FCC "could be shutting down the abusive lawsuits by closing the legal loopholes that trial lawyers have exploited to target legitimate communications between businesses and consumers."[36] Now is the time for the FCC to do just that.

Clarity is Desperately Needed

Since the *ACA* ruling, *Marks* has thrown a monkey wrench into the mix. By creating an inter-circuit split (contradicting *ACA* and *Dominguez*) as well as an intra-circuit split

[34] Pai Dissent at 2.
[35] *ACA v. FCC* at 23.
[36] Pai Dissent at 2.

(contradicting *Satterfield*), *Marks* has created additional confusion and unsettled law. As directed by *ACA*, it is incumbent on the FCC to resolve to resolve this confusion.[37]

As Chairman Pai has stated, we must look at the *present* capacity of a dialing device.[38] If a device, such as the type of predictive dialers so many responsible companies use today, cannot actually generate, store or dial random or sequential numbers without some modification, it shouldn't be categorized as an ATDS. Lawmakers didn't intend to interfere with "expected or desired communications between businesses and their consumers."[39] Chairman Pai stated:

> An automatic telephone dialing system is 'equipment which has the capacity' to dial random or sequential numbers, meaning that system actually can dial such numbers at the time the call is made. Had Congress wanted to define automatic telephone dialing system more broadly it could have done so by adding tenses and moods, defining it as 'equipment which has, has had, or could have the capacity.' But it didn't. We must respect the precise contours of the statute that Congress enacted.[40]

With this in mind, the lack of clarity on what constitutes an ATDS, accompanied by the fear that companies have of being sued under the TCPA, must end. We urge the Commission to set forth a clear, reasoned definition of ATDS that only captures a dialing system that has the present ability to generate or store, and then dial, random or sequential numbers. The Commission should make clear that the text of the TCPA is limited to devise with random or sequential number generation. Smartphones, predictive dialers, and any other dialing devices

[37] *ACA* at 25 ("The Commission's most recent effort falls short of reasoned decisionmaking in [offer[ing] no meaningful guidance to affected parties in material respects on whether their equipment is subject to the statute's autodialer restrictions."
[38] Pai Dissent at 3.
[39] Pai Dissent at 4, citing House Report at 17.
[40] *Id.* at 3-4.

that do not have the *present* ability to generate or store, and then dial, random or sequential numbers should *not* be categorized as predictive dialers. Clear and unequivocal guidance on the definition of ATDS will bring an end to the last 15 years of twisted interpretations and re-interpretations that, as Chairman Pai stated three years ago, has been, charitably put, "a bit of a mess."[41] Should *Marks* be the new standard, we expect a veritable parade of horribles that will include more TCPA litigation and severely limited communication between businesses and their customers.

* * *

Thank you for your efforts to bring urgently needed clarity to how to define an ATDS. For the past decade, businesses have been operating in a state of limbo, unsure how to define an ATDS and staring down the barrel of potentially door-shutting litigation. Between the pervasive confusion over the definition of an ATDS and the abusive litigation environment, it has been a veritable minefield for legitimate callers to reach their customers. Now is the time for the FCC to put an end to the madness.

Respectfully submitted,

/s/ Sheryl A. Wright
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[41] *Id.* at 4.